STATE OF MICHIGAN

IN THE SUPREME COURT FOR THE STATE OF MICHIGAN

KEITH W. MAYBERRY and
JOANNA MAYBERRY, ~~his wife,~~

Plaintiffs/Appellant,

v

GENERAL ORTHOPEDICS, P.C.,
~~a Michigan Professional Corporation, and~~
~~DR.~~ WILLIAM M. KOHEN, M.D.,
~~Jointly and Severally,~~

Defendants/Appellees.

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Supreme Court No.:
Court of Appeals No. 244162
Oakland Cty Circuit Case No. 02-039236-NH

J. McDonald

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PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT PURSUANT TO MCR 7.302

PROOF OF SERVICE

EXHIBITS

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STATEMENT OF ORDERS APPEALED FROM, JURISDICTION AND RELIEF SOUGHT

Plaintiffs'/Appellants', Keith and Joanna Mayberry, file this Application for Leave to Appeal pursuant to MCR 7.302(B)(5). This Application is made from the Court of Appeals Order denying their Motion for Reconsideration. **(See Exhibit 1 - Court of Appeals' Order dated March 30, 2004.)** The Motion for Reconsideration followed the Court of Appeal's opinion and order affirming the trial court's dismissal of all claims upon the request of the Defendants/Appellees' Motion for Summary Disposition. The Court of Appeals entered this order on February 17, 2004. **(See Exhibit 2 - Court of Appeal's unpublished opinion.)** Plaintiff/Appellants initial appeal was from the trial court's order granting Summary Disposition on September 24, 2002. **(See Exhibit 3 - Circuit Court Order.)**

The Defendants' Motion centered around the application of MCL 600.2912(b) et seq; MCL 600.5856(d) et seq; the effect of the tolling provision upon the filing of a subsequent Notice of Intent to Sue; and the effect of the tolling provision upon discovery of additional parties and claims. The hearing on this Motion was held on September 4, 2002 and the transcript has been attached. **(See Exhibit 4 - Transcript of Motion for Summary Disposition.)**

This Supreme Court has jurisdiction over this matter pursuant to MCR 7.302(B)(5). As will be shown below, the decision of the Court of Appeals is clearly erroneous and will cause material injustice to the Plaintiffs/Appellants. Therefore, the Plaintiffs/Appellants respectfully request that the Order of Dismissal granted by the Oakland County Circuit Judge John J. McDonald and affirmed by the Court of Appeals be reversed with all proceedings to be remanded back to Circuit Court for trial.

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I:

The Court of Appeal's ruling prevents the Defendants/Appellees, General Orthopedics, P.C., and William Kohen, M.D. from receiving their statutory required 182 day notice period, when additional claims and additional parties are added within the Statute of Limitations, and constitutes an unconstitutional re-write of MCL 600.29129(b) et seq; and MCL 600.5856(d) and is clear palpable error.

QUESTION II:

The Court of Appeal's ruling unconstitutionally shortens Plaintiff/Appellants applicable Statute of Limitations against General Orthopedics, P.C., and the newly asserted claims against William Kohen, M.D., to one and one half years and is an unconstitutional rewrite of MCL 600.2912(b) et seq; and MCL 600.5856(d) and is clear palpable error.

QUESTION III:

The Court of Appeal's ruling precludes the Plaintiff/Appellants from receiving the statutory allowed tolling of the Statute of Limitations during the Notice of Intent period regarding the timely served Notice of Intent to Sue upon General Orthopedics, P.C. and the additional claims asserted on William Kohen, M.D. and constitutes an unconstitutional re-write of MCL 600.2912(b) et seq; and MCL 600.5856(d) and is clear palpable error.

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STATEMENT OF FACTS

The Mayberrys' cause of action is a claim for medical mal-practice arising out of the care and treatment Mr. Mayberry received from the Defendant/Appellees on November 2, 1999, November 18, 1999, November 22, 1999, December 2, 1999 and December 10, 1999. **(See Exhibit 5 - Plaintiff's Complaint.)** On November 2, 1999 Mr. Mayberry presented to Defendant Kohen when he suffered a fractured wrist as a result of a fall. **(See Exhibit 5.)** Defendant Kohen attempted a close reduction and assured Mr. Mayberry that no surgery was necessary. (Id.)

Mr. Mayberry returned to Dr. Kohen's office for a follow-up appointment on November 18, 1999. (Id.) X-rays revealed a shift in the bone of his wrist and that surgery would be necessary to straighten it. (Id.)

On November 22, 1999 Mr. Mayberry underwent close reduction, and an application of an external fixture to his wrist. (Id.)

Intra-operatively, Defendant Kohen noted a "troubling interior spike" and median nerve symptoms. Defendant Dr. Kohen failed to decompress the wrist. (Id.)

On December 2, 1999 Mr. Mayberry returned for his first post-operative visit. (Id.) At that time, he had complete numbness of his hand and was unable to bend or extend his fingers. (Id.) Dr. Kohen suggested a second opinion be sought. Mr. Mayberry was seen for a second opinion and was taken back for additional surgery on December 10, 1999. (Id.) Surgical findings included a cut in the superficial radial nerve and severely compressed nerves throughout the compartmental area. (Id.) Mr. Mayberry required a plate and screw fixation of the wrist.

As a result in the delay in treatment and failure to decompress the wrist, Mr.

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Mayberry has been left with a loss of range of motion; loss of function; RSD; stiffness; and carpal tunnel like problems. (Id.)

On June 21, 2000, Benjamin T. Hoffiz, Jr., Esq., filed a Notice of Intent to Sue upon Defendant William Kohen, M.D. **only**, stating one Violation of the Standard of Care. **(See Exhibit 6 - Notice of Intent to Sue by Benjamin T. Hoffiz, Jr., Esq.)** The June, 2000 Notice of Intent was only served upon the Defendant Dr. Kohen and only asserted one violation of the standard of care. **(See Exhibit 6, P 3.)**

On October 11, 2001, pursuant to MCL 600.2912(b), Blum, Konheim and Elkin timely served a Notice of Intent to Sue upon the Defendants Dr. Kohen and General Orthopedics, P.C., and alleged additional violations of the standard of care. **(See Exhibit 7 - October 2001 Notice of Intent to Sue.)**

On October 12, 2001, the Defendants, Dr. William Kohen and General Orthopedics, P.C. received Mr. Mayberry's Notice of Intent to Sue. **(See Exhibit 8 - Certificate of Return Service.)**

The applicable Statute of Limitations in this matter was set to expire on November 21, 2001. (See MCL 600.5805.) However, pursuant to MCL 600.5856 and *Omelenchuck v City of Warren 461 Mich 567; 609 NW2nd 177 (2000)*, the applicable Statute of Limitations should have been tolled as to all of the claims asserted against Defendant Dr. Kohen, and, certainly, as to the newly added party, Defendant General Orthopedics, P.C.

On March 19, 2002, after the expiration of the applicable Notice provision, the Mayberrys filed their complaint against the Defendants. **(See Exhibit 5.)** Subsequently, on or about April 4, 2002, Defendants filed their Motion for Summary Disposition

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pursuant to MCR 2.116(c)(7),(8),(10) which sought dismissal of the Mayberry's complaint due to an alleged failure to comply with the applicable Statute of Limitation. **(See Exhibit 9 - Defendants' Motion for Summary Disposition.)** On May 1, 2002, the Mayberrys filed their response to Defendants' Motion for Summary Disposition stating that Defendants' argument was in error and that the Mayberrys are entitled to a tolling of the applicable Statute of Limitations during the Notice period. **(See Exhibit 10 - Plaintiffs' Response to Defendants' Motion for Summary Disposition.)**

On May 3, 2002, Defendants filed their reply to Plaintiffs' Response to Defendants' Motion for Summary Disposition. **(See Exhibit 11 - Defendants' Reply.)** On September 4, 2002, a hearing was heard before Oakland County Circuit Court Judge John J. McDonald. At that time, Judge McDonald granted the Defendants' Motion for Summary Disposition. **(See Exhibits 3 and 4.)**

On January 8, 2003, the Mayberrys filed their appeal seeking reversal of the trial court's order granting the Defendants' Motion to Dismiss. **(See Exhibit 12 - Plaintiffs/ Appellants' Brief.)** On February 12, 2002 Defendant/Appellees filed their response to the Mayberrys' Claim of Appeal. **(See Exhibit 13 - Defendants' Response.)** On February 17, 2004, without the benefit of oral argument, the Court of Appeals affirmed the trial court's granting of Defendant's Motion for Summary Disposition and dismissing of Plaintiff/Appellant's Appeal on the basis of Statute of Limitations. **(See Exhibit 2.)** On March 9, 2004 Plaintiff filed their Motion for Rehearing Pursuant to MCR 7.215(h)(1) stating that the Court of Appeal's decision was clear palpable error. **(See Exhibit 14 - Plaintiff/Appellants' Motion for Reconsideration.)**

On March 30, 2004 the Court of Appeals denied Plaintiff's Motion for Reconsideration. **(See Exhibit 1.)**

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STANDARD OF REVIEW

Plaintiffs/Appellants file their Application for Leave to Appeal, pursuant to MCR 7.302. Grounds for said Application for Leave to Appeal is based upon the Court of Appeal's decision which was clearly erroneous and will cause material injustice should it stand. (See MCR 7.302(B)(5).) In this matter, the Court of Appeals affirmed the trial court's granting of Summary Disposition pursuant to MCR 2.116(c)(7),(8),(10). **(See Exhibit 2.)**

Review of such decisions on Summary Disposition Motions is de novo. *Thane v Detroit Library Commission 465 Mich 68, 74; 631 NW2nd 678 (2001).* The court must consider all documentary evidence submitted by the parties accepting as true the contents of their complaint unless affidavits or other appropriate documents specifically contradict them. *Sewell v Southfield Public Schools 456 Mich 67, 674; 576 NW2nd 153 (1998).*

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LAW AND ARGUMENT

I.

The Court of Appeal's ruling prevents the Defendants/Appellees, General Orthopedics, P.C., and William Kohen, M.D. from receiving their statutory required 182 day notice period, when additional claims and additional parties are added within the Statute of Limitations, and constitutes an unconstitutional re-write of MCL 600.29129(b) et seq; and MCL 600.5856(d) and is clear palpable error.

As to Defendant General Orthopedics, P.C. and the additional claims alleged against Defendant Dr. Kohen, the Defendants are entitled to the applicable Notice of Intent period prior to a summons and complaint being filed against them. (See MCL 600.2912(b).) That being the case, the Mayberrys are barred from filing suit against General Orthopedics, P.C. or asserting additional claims against the Defendant Dr. Kohen until the Notice of Intent to Sue period expires. The Court of Appeal's interpretation of MCL 600.2912(b) is clear palpable error in that it prevents Defendant General Orthopedics, P.C. and the Defendant Dr. Kohen, in regards to the additional claims, from receiving their protected statutory right of a Notice of Intent to Sue period. The effect of this error would allow the Mayberrys to file suit against the Defendant General Orthopedics, P.C. and add the additional claims against Dr. Kohen within the Statute of Limitation and without providing the Defendants with their statutory protected Notice of Intent to Sue period. This was clearly not intended by the legislature, and thus, the interpretation of the Court of Appeals is clear palpable error.

In part, MCL 600.2912(b) states as follows:

(1) "A person shall not commence an action alleging medical mal-practice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

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Clear interpretation of this statue requires that if a Plaintiff wishes to file a medical mal-practice claim against a health care professional, he or she must first serve upon them a Notice of Intent to Sue and is then precluded from filing suit for "not less than 182 days." The clear language of the statute does not require that any and all health professionals and any and all claims be asserted in the same Notice of Intent. The clear language of the statute does not require that any and all Notices of Intent as to different Defendants be sent on the same day. The clear language does not require that the Plaintiff shall be limited to one Notice of Intent to Sue and said Notice must contain all potential claims against all potential Defendants. Certainly, if the legislature wished to devise a statute which required a potential Plaintiff to assert any and all claims against any and all parties in a single Notice of Intent, and that the Plaintiff was entitled to only one Notice of Intent, it could have been drafted and passed. Such an interpretation goes against the clear and unambiguous language of this statute.

As this court is aware, interpretation of clear and unambiguous language is not permitted. "When the language is unambiguous, we must enforce the meaning plainly expressed and judicial construction is not permitted." *Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW2nd 116 (2000).* Thus, the plain reading of MCL 600.2912(b) indicates that every health care professional or facility, and/or newly asserted claims against previously noticed health care professionals or facilities, are entitled to the 182-day notice provision. Clear interpretation states regardless of how many prior Notices have been filed against other health professional or health care facilities, each additional health care professional or facility is still entitled to the 182-day period. This interpretation empowers the statute to carry out the purpose for which

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it was intended by the legislature. That purpose was to provide notice to potential health care facilities or health care professionals of potential claims within the applicable Statute of Limitations and allow those health care professionals or facilities the opportunity to investigate and negotiate resolution of the matter, pre-suit.

Furthermore, such an interpretation is consistent with MCL 600.2912(b)(3) which lawfully shortens the Notice of Intent to Sue period when newly discovered health professionals are added while a suit is already pending. MCL 600.2912(b)(3) states as follows:

> "(3) The 182 day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:
>
> (a) Claimant has previously filed the 182 days Notice required in subsection 1 against other health professionals or health facility involved in the claim;
>
> (b) The 182 Notice period has expired as to the health professionals or health facilities described in Subpart (a);
>
> (c) The claimant has filed a Complaint and commenced an action alleging medical mal-practice against one or more of the health professionals or health facilities described in Subpart (a); and
>
> (d) The claimant did not identify and could not have reasonable have identified a health profession or health facility to which notice must be sent under Subsection (1) as a potential party to the action before filing the Complaint."

The Court of Appeals current interpretation of MCL 600.2912(b) is inconsistent with MCL 600.2912(b)(3). The legislature would not afford a Notice of Intent to Sue period for a newly discovered health professional added while in suit and then eliminate a Notice of Intent to Sue period for additional health professionals added prior to suit being filed. It stands to reason that if newly discovered parties are entitled to a Notice

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of Intent to Sue period while in suit, certainly additional parties or claims asserted within the Statute of Limitations prior to suit being filed would also be entitled to a Notice of Intent to Sue period. The Court of Appeals current interpretation of MCL 600.2912(b) eliminates additional health care facilities or professionals, and/or newly asserted claims against previously notified health care professionals or facilities, from their statutory protected Notice of Intent to Sue period. The Court of Appeals' ruling is an unconstitutional rewrite of MCL 600.2912(b) and constitutes clear palpable error.

In this case, it is undisputed that Defendant General Orthopedics, P.C. is a health care facility under the applicable medical mal-practice statute. Furthermore, it is undisputed that the October 2001 Notice of Intent to Sue asserts additional claims and injuries against the Defendant Dr. Kohen which were not previously asserted in the June 2000 Notice of Intent to Sue. **(See Exhibits 6 and 7.)** Pursuant to MCL 600.2912(b), the Defendants, General Orthopedics, P.C. and, William Kohen, M.D., in regards to the newly asserted claims and injuries, are entitled to a Notice of Intent to Sue prior to an action being commenced against them. Furthermore, Defendants, General Orthopedics, P.C., and William Kohen, M.D., as to the additional claims and injuries alleged, are entitled to their 182 day notice period to properly investigate and perhaps attempt to resolve these claims prior to suit being filed.

The only Notice of Intent to Sue ever served upon Defendant General Orthopedics, P.C. was sent and received on/or about October 12, 2001. In addition, the only Notice of Intent to Sue ever served upon Defendant William Kohen which identified additional claims and injuries was sent and received on October 12, 2001. Therefore, pursuant to MCL 600.2912(b) the Defendants were entitled to the 182 day

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notice period prior to the Mayberrys filing suit. Do the Defendants General Orthopedics, P.C. and Dr. Kohen lose their 182 day Notice of Intent to Sue period merely because the Mayberrys filed a prior Notice of Intent to Sue against Defendant Dr. Kohen alleging only one violation of the Standard of Care? If the Court of Appeals' opinion upheld, this would be the result.

It is clear that the legislature did not intend such an interpretation to take place. It is clear that the Court of Appeals has erroneously rewrote the statute effectively limiting any and all Defendants and claims asserted, whether noted initially or thereafter discovered, to one Notice of Intent to Sue and one 182 day notice provision. This interpretation is clear and palpable error.

The correct interpretation of MCL 600.2912(b) entitles newly added health care facilities, and/or newly asserted claims against previously named health care facilities, a Notice of Intent to Sue along with the applicable 182 day period. Thus, once additional claims are asserted in a subsequent Notice of Intent, or newly added parties are provided with a Notice of Intent, the 182 day notice period begins to run. Since the Plaintiff would then be barred from filing a claim asserting the newly added claims and injuries and/or naming a newly added party before the applicable 182 day notice period, the applicable Statute of Limitations would be tolled for the number of days in the interval in which suit cannot be brought. **(See MCL 600.5856(d))**.

MCL 600.5856(d) states as follows:

> "The statute of limitations or repose are tolled; (d) if, during the applicable notice period under (b), a claim would be barred by the Statute of Limitation or repose, for not longer than the number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with Section 2912(b)."

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In fact, the Michigan Supreme Court has held MCL 600.5856(d) to mean that the applicable Statute of Limitations is tolled during the notice period if the Statute expires during the Notice period. Once the applicable waiting period expires, the Plaintiff would have the amount of days that were remaining at the time of filing the proper Notice of Intent to Sue, pursuant to MCL 600.2912(b). *Omelenchuck v City of Warren, 461 Mich 567, 574-579; 600 NW2nd 177 (2000); Soloway v Oakwood Hospital Corporation, 454 Mich 214; 561 NW2nd 843 (1997).* Therefore, the Plaintiff's Statute of Limitations would be tolled if it were to expire during the notice period.

In this case, the Mayberrys' Statute of Limitations was set to expire on November 22, 2001. On October 12, 2001 the Mayberrys served upon Defendant Dr. Kohen new and additional claims and injuries and served upon Defendant General Orthopedics, P.C., the only Notice of Intent to Sue which it had never received. Since the Mayberrys' applicable Statute of Limitations would have expired during the notice period, they are entitled to a tolling of the Statute of Limitations. Therefore, the Mayberrys' medical mal-practice complaint which was filed on March 19, 2002 was filed timely once the applicable notice provision expired.

The Appellate Court's ruling disregards MCL 600.2912(b) requirement that a Plaintiff serve a Notice of Intent upon a health professional and wait the 182 day period prior to the filing of a complaint. The Courts' ruling fails to address the issue of serving a subsequent Notice of Intent to Sue upon additional parties or asserting additional claims within the Statutes of Limitations. This is the crux of the Plaintiff/Appellants current claim. The Court's current ruling stands for the proposition that a Plaintiff has only one chance to name any and all potential Defendants and assert any and all claims

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and injuries. This Court's ruling is a clear rewriting of MCL 600.2912(b) and is not supported by either statute or case law.

The difficulty with this Court's interpretation is that if a Plaintiff files a Notice of Intent to Sue asserting certain claims against Defendants, he cannot file a second Notice of Intent to Sue asserting additional claims or naming additional Defendants within the last six months of the applicable Statute of Limitations. The reason being that if the Plaintiff files a second Notice of Intent to Sue asserting additional claims or naming additional Defendants within the last six months of the applicable Statute of Limitations, he would then be barred from filing a complaint asserting those additional claims or naming the additional Defendant pursuant to MCL 600.2912(b). This Court's interpretation unconstitutionally limits the Statute of Limitations to one and one half years on any additional claims asserted or any additional parties named. This was not the intent of the legislature.

A second Notice of Intent filed within the two year Statute of Limitations accomplishes the objectives of the act and is not prejudicial to the Defendant. In fact, providing the Plaintiff with an opportunity to file a second Notice of Intent against additionally named Defendants and/or asserting additional claims accomplishes the objective that each and every party and each and every claim will be afforded a 182 day period so that said party, and/or claim, may be properly investigated and/or resolved prior to a complaint being filed.

The following example illustrates the clear and palpable error that the Court of Appeals has made in interpreting MCL 600.2192(b). Assume that a plaintiff files a Notice of Intent to Sue against a physician and he waits the applicable 182 days. The

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182 day period expires prior to the running of the Statute of Limitations, but no suit is filed due to a difficulty in determining the applicable claims and/or parties. Exactly five (5) months prior to the expiration of the Statute of Limitations, it is determined that an additional claim and/or additional party committed the mal-practice. The plaintiff then files a second Notice of Intent to Sue naming the additional party and asserting the additional claim. The plaintiff must then wait the applicable 182 day period, prior to filing a complaint against the added party and asserted additional claim. However, during this 182 day period, the plaintiff's Statute of Limitations expires. This Court's interpretation of MCL 600.2912(b) causes the Plaintiff to forfeit a cause of action as to the additional parties and claims asserted in the Amended Notice of Intent to Sue which had been timely filed within the Statute of Limitations. This was not the intent of the legislature.

In this case, the Mayberrys filed an Intent to Sue against the Defendant Dr. Kohen only alleging one violation of the Standard of Care and waited the applicable 182 days period. It was later determined that there were additional claims against the Defendant Dr. Kohen and an additional party, the Defendant General Orthopedics, P.C. The Mayberrys appropriately served an Amended Notice of Intent to Sue upon the Defendants two (2) months prior to the expiration of the Statute of Limitations. The Mayberrys were then barred from filing suit against the Defendant General Orthopedics, P.C. and, asserting the additional claims against the Defendant Dr. Kohen, until after the 182 day notice period expired. Obviously, the Notice period expired beyond the Statute of Limitations. This Court's interpretation unconstitutionally shortened the Mayberry's Statute of Limitations from 24 months to 22 months. This Court's interpretation of

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MCL 600.2912(b) is clear error and has caused material injustice to the Mayberrys. The Mayberrys are entitled to a reversal of the Court of Appeals' decision and remand to Trial Court for further proceedings.

II:

The Court of Appeal's ruling unconstitutionally shortens Plaintiff/Appellants applicable Statute of Limitations against General Orthopedics, P.C., and the newly asserted claims against William Kohen, M.D. to one and one half years and is an unconstitutional rewrite of MCL 600.2912(b) et seq; and MCL 600.5856(d) and is clear palpable error.

The Statute of Limitations for a medical mal-practice claim is set forth in MCL 600.5805. MCL 600.5805 states in part as follows:

> "(1) A person shall not bring or maintain an action to recover damages for injuries to a person or property unless, after the claim first occurred, the Plaintiff or for someone whom the Plaintiff claims, the action is commenced within the periods of times prescribed by this section. . . . . .
>
> (4) Accept as otherwise provided in this chapter, the Statute of Limitations is two years for an action of mal-practice."

The Mayberrys' claim against the Defendants, Dr. Kohen and General Orthopedics, P.C. is medical mal-practice. Thus, the applicable Statute of Limitations in this matter is two years from the date the mal-practice occurred.

However, the Court of Appeals' erroneous ruling shortened the Mayberry's Statute of Limitations against the Defendants General Orthopedics, P.C. and the newly asserted claims noticed against the Defendant Dr. Kohen to one and one half years. This unconstitutional rewriting of MCL 600.5805 and MCL 600.2912(b) is without statutory or legal precedent and constitutes clear palpable error. The Mayberrys are entitled to reversal of this Appellate Court's ruling and a remand to the Circuit Court for further proceedings.

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Pursuant to MCL 600.5805, the Statute of Limitations for a medical mal-practice claim is two years. Generally speaking, Plaintiff must bring his action within two years when the date of mal-practice first occurred. *Soloway v Oakwood Hospital Corporation, 454 Mich 214, 219; 561 NW2nd 843 (1997).* However, MCL 600.2912(b) requires that a Notice of Intent to Sue be served upon a health care professional and, "a period not less than 182 days expire," prior to an action being commenced. This Court's erroneous ruling unconstitutionally shortens a Plaintiff's Statute of Limitations to one and one half years on any newly added party or newly asserted claim.

This Court's ruling failed to acknowledge that the 182 day period is not a tolling period for Plaintiff but a bar from filing an action against a health care profession named in the Notice of Intent to Sue. Thus, a given Plaintiff is forbidden from commencing an action against the health care professional named in the Notice of Intent to Sue during that time period. According to this Court's interpretation of MCL 600.2912(b)(1), a Plaintiff would be forever barred from filing a complaint against a health care profession who received a Notice of Intent to Sue within six months before the expiration of the Statute of Limitations, but after a Notice of Intent to Sue had been previously served upon a different health care professional. Thus, the plaintiff's Statute of Limitation as to the additional health care professional whose named in the subsequent Notice of Intent to Sue is shortened to one and one half years instead of the statutory two years.

In this case, Defendant Kohen, received a Notice of Intent to Sue alleging one violation of the Standard of Care in June of 2000. In October 2001 a second Notice of Intent to Sue was served upon Defendant Kohen asserting additional violations of the

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Standard of Care and injuries. This Notice of Intent to Sue was also served upon a newly added Defendant, General Orthopedics, P.C. (This was the only Notice of Intent to Sue ever served upon Defendant General Orthopedics, P.C.) The Mayberrys were required to serve these Notices of Intent to Sue upon Defendant Dr. Kohen, asserting the additional claims, and upon the new party Defendant General Orthopedics, P.C. Accordingly, the Mayberrys were barred from filing their medical mal-practice complaint against Defendant Dr. Kohen and the newly added Defendant, General Orthopedics, P.C. until the 182 day notice period expired. However, the applicable Statute of Limitations expired during this notice period. Pursuant to MCL 600.5856(d), the Mayberrys should have received a tolling of the Statute of Limitations due to the fact that their limitations period expired during the notice period.

However, this Court's ruling invalidated MCL 600.5856(d) and summarily dismissed the Mayberrys' Complaint as untimely. The Court's erroneous ruling contradicts what is required by MCL 600.2912(b). If the Mayberrys filed their Complaint for medical mal-practice against the Defendants General Orthopedics, P.C. and asserted the additional claims against Dr. Kohen which had been asserted in the subsequent Notice of Intent to Sue within the notice period, but prior to the expiration of the applicable Statute of Limitations, the Defendants, General Orthopedics, P.C. and Dr. Kohen would have sought Summary Disposition for the Mayberrys' failure to provide 182 day notice period to the health care facilities as required underneath the Statute. Thus, if the Court of Appeal's interpretation of MCL 600.2912(b) is correct, the Mayberrys were stuck between the proverbial rock and a hard place. Either way the Mayberrys would have acted, their claim would have been subject to dismissal.

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The Court of Appeal's interpretation of MCL 600.2912(b) is clearly erroneous and has caused material injustice to the Mayberrys. This Supreme Court should reverse the Court of Appeal's erroneous decision and remand this case to the Circuit Court for further proceedings.

III:

The Court of Appeal's ruling precludes the Plaintiff/Appellants from receiving the statutory allowed tolling of the Statute of Limitations during the Notice of Intent regarding the timely served Notice of Intent to Sue upon General Orthopedics, P.C. and the additional claims asserted on William Kohen, M.D. and constitutes an unconstitutional re-write of MCL 600.2912(b) et seq; and MCL 600.5856(d) and is clear palpable error.

The Statute is clear that the Mayberrys are barred from filing a lawsuit for medical mal-practice against the Defendants, General Orthopedics, P.C. or assert the newly added claims against the Defendant Dr. Kohen without providing a Notice of Intent to Sue within the applicable Statute of Limitations. The Statute makes it further clear that after the Notice of Intent to Sue is served upon the Defendants, the Mayberrys must wait the applicable notice period prior to filing any said lawsuit for medical mal-practice.

Once the applicable waiting period expires, the Plaintiff would have the amount of days that were remaining at the time of filing the Notice of Intent to Sue pursuant to MCL 600.2912(b). *Omelenchuck v City of Warren, 461 Mich 567; 609 NW2nd 177 (2000); Soloway v Oakwood Hospital Corporation, 454 Mich 214; 561 NW2nd 843 (1997).* Therefore, the Plaintiff's Statute of Limitations would be tolled if it were to expire during the notice period. The Mayberrys' current Complaint was timely filed upon the expiration of the 182 notice period which was required to be given to the Defendants, General Orthopedics, P.C., as well as, to Defendant Kohen with the newly

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asserted claims.

The Appellate Court's ruling incorrectly relies upon MCL 600.2912(b)(6) in affirming the lower Court's ruling. MCL 600.2912(b)(6) reads as follows:

> "After the initial notice is given to "a"; health professional or health facility under this section, the; **"tacking or addition of successive"** 182 periods is not allowed irrespective of how many additional Notices are subsequently filed for **"that claim"** and irrespective of the number health professionals or health facilities notified." (emphasis added)

MCL 600.2912(b)(6) is narrow in its scope. It speaks to the initial notice provision given to "a" health professional or health facility . . . for **"that claim."** It does not speak to "all" health professionals or "any and all claims." Therefore, the Court of Appeals reliance upon MCL 600.2912(b)(6) to dismiss the Mayberrys' newly raised claims and the newly added Defendant is an unconstitutional broadening of MCL 600.2912(b)(6). This rewrite was clearly not intended by the legislature and constitutes clear palpable error. A correct reading of the above statute is that after the expiration of the Statute of Limitations, no tacking or addition of 182 day periods is allowed.

The Michigan Court of Appeals has made it clear that strict compliance with MCL 600.2912(b) is required or else dismissal is appropriate. *Rheaume v Vandenberg, 232 Mich App 417; 591 NW2nd 331 (1999).* Thus, the Defendant, General Orthopedics, P.C. must receive a Notice of Intent to Sue prior to any claim being filed against it. Furthermore, the Mayberrys are barred from filing their Complaint against the Defendant General Orthopedics, P.C. until the expiration of the Notice of Intent to Sue.

MCL 600.2912(b)(6) does not speak to additional actions or parties discovered after an initial Notice has been filed. Read correctly, MCL 600.2912(b)(6) bars the tacking or addition of successive 182 days periods "after the initial Notice is given to

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"**a**" health professional or health facility." Irrespective of how many additional Notices are subsequently filed for "**that claim**" (emphasis added). Thus, the legislature limited the tacking or additional successive 182 day periods to toll the limitations only as to "that claim" alleged against "the" party who received the initial notice. Simply put, the legislature did not **bar the additional claims or health professionals or health facilities in subsequent notices filed within the Statute of Limitations**. Furthermore, the legislature did not take away a health professional or health facilities right to receive the 182 day period to investigate a potential medical mal-practice claim by the passage of MCL 600.2912(b)(6).

The purpose of the notice requirement is clear in that is to place a given health facility or health professional on notice of a potential mal-practice claim. Furthermore, the Notice period is to allow for that facility to investigate said claim and perhaps work towards resolution pre-suit. Without Notice to Defendant General Orthopedics, P.C. or Notice of the newly asserted claims against Defendant Dr. Kohen, the Defendants would be denied their statutory right to investigate said claims and work towards resolution pre-suit. Certainly, the legislature did not intend for newly discovered parties to be denied their right to Notice and the waiting period simply because a given Plaintiff happened to file a Notice of Intent to Sue upon a different health professional or failed to assert any and all claims. This would be the result if this Court were to rule in accordance with the Court of Appeals and with the panel in the *Orta v HealthOne Medical Center, P.C., et al, 2002 WL 236025, Mich App, unpublished*, attached as Exhibit 15. **(See Exhibit 15.)**

The clear error in the Court of Appeal's ruling makes perfect sense when one

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evaluates the Courts' ruling outside of the medical mal-practice parameter. For example, a plaintiff may file as many Complaints alleging general negligence against various parties asserting various theories of liability all arising out of the same incident up until the date the expiration of the Statute of Limitations period. Clearly, the Legislature did not intent to limit the Plaintiff's right to file a cause of action against various parties merely because it happens to be a medical mal-practice claim. Therefore, the Plaintiff should be allowed to file as many Notices of Intent to Sue alleging as many different theories of liability against any and all parties up until the date in which the Statute of Limitations expires. Then the only Notice of Intent to Sue which would be entitled to tolling would be a Notice of Intent to Sue that was filed immediately prior to the expiration of the Statute of Limitations. This is why the Court of Appeals reliance on MCL 600.2912(b)(6) is misplaced.

MCL 600.2912(b)(6) assumes two factors in its application. First, that the subsequent Notice of Intent to Sue spoke only to the claim asserted in the prior Notice of Intent to Sue and the health professional(s) notified was the same health professional(s) notified in the prior Notice of Intent to Sue. As discussed above, clearly this was not the case in Mr. Mayberry's cause of action.

Second, MCL 600.2912(b)(6) implies that a tolling has already taken place. The Legislature used clear language in describing when MCL 600.2912(b)(6) would apply. As previously stated, this statute prohibits the "**tacking**" or "**addition**" of successive 182 day periods. Blacks Law Dictionary, Fifth Edition, defines the use of "tacking" as the "use to avoid the bar of the Statute of Limitations. (Id. at 307.) Thus, the term "tacking" must be used in conjunction with an attempt to avoid the applicable Statute of

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Limitations and any applicable tolling provision.

In this case, the Mayberrys were not entitled to a tolling of the Statute of Limitation until the Notice of Intent was filed in October 2001 which asserted additional claims against Dr. Kohen and added an additional party, the Defendants General Orthopedics, P.C. Since no "tacking" or "addition" of successive 182 day periods occurred, MCL 600.2912(b)(6) does not apply. Thus, the Court of Appeal's reliance on this statute is misplaced and clear palpable error.

Additionally, the Court of Appeals' reliance upon *Ashby v Byrnes, M.D., 251 Mich App 537; 651 NW2nd 22 (2002)* is also misplaced. *Ashby, supra* fails to address the issue as to whether or not MCL 600.2912(b)(6) unconstitutionally shortens the Plaintiff's medical mal-practice Statute of Limitation in regards to additional health care facilities subsequently notified or additional claims subsequently discovered after the filing of a prior Notice of Intent to Sue. Furthermore, *Ashby, supra* fails to address the situation in which additional Notices are provided to other health professionals or health facilities in regards to newly asserted claims as opposed to a claim which was already noticed in the prior Notice of Intent to Sue. *Ashby, supra* fails to address and resolve the conflict caused by the Court of Appeals' interpretation of MCL600.2912(b); MCL 600.2912(b)(3); and MCL 600.2912(b)(6). (See *Ashby v Byrnes, M.D., 251 Mich App 537; 651 NW2nd 22 (2002).*)

Finally, *Ashby, supra* does not address the health professional or health facilities right to 182 day notice period to investigate and potentially resolve medical mal-practice claims prior to suit. It is clear from the unambiguous language of MCL 600.2912(b), the legislature did not intend for additionally named health professionals or health

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facilities to forfeit their 182 day period merely because the Plaintiff happened to file a prior Notice of Intent to Sue upon a different party. These issues were clearly not addressed in *Ashby*.

The Appellant Court's incorrect and improper interpretation of MCL 600.2912(b), and MCL 600.2912(b)(6) is clearly erroneous and has caused material injustice to the Mayberrys. The Mayberrys are entitled to a reversal of the Court's Appeals affirmation of the Trial Court's dismissal and a remand back to the Circuit Court for further proceedings.

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OPINION OF COURT OF APPEALS

Pursuant to MCR 7.302(g), attached as Exhibit 2 is the Court of Appeals unpublished memorandum opinion dated February 17, 2004.

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OPINION OF TRIAL COURT

Pursuant to MCR 7.302(f), attached as Exhibit 3 is the Order of the Circuit Court granting Defendant's Motion for Summary Disposition. Also, attached as Exhibit 4 is the transcript of oral argument regarding Defendant's Motion for Summary Disposition dated September 4, 2002.

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RELIEF SOUGHT

As argued above, the Court of Appeal's ruling affirming the Trial Court's dismissal of the Mayberrys' cause of action is clearly erroneous and will cause material injustice. Furthermore, the Court of Appeals decision conflicts with MCL 600.2912(b)(3) in that it is unclear as to why the legislature would allow for a Notice of Intent to Sue for newly added additional parties in suit and then not allow a Notice of Intent to Sue period for newly added additional parties receiving a Notice of Intent to Sue pre-suit.

The Court of Appeal's decision is clearly erroneous in that it forfeits an additional later named health care facility's statutory right to a Notice of Intent period merely because a given Plaintiff filed a prior Notice of Intent to Sue upon a different health care professional. Furthermore, the Court of Appeals' ruling is erroneous in that it unconstitutionally shortened the Mayberrys' 24 month statute of limitations to 22 months.

Finally, the Court of Appeals' ruling is erroneous as it misapplies MCL600.2912(b)(6) by incorrectly asserting that it forbids a tolling of the Statute of Limitations merely because a prior Notice of Intent to Sue had been filed prior to the Statute of Limitations running.

For the reasons set forth above, the Mayberrys are entitled to a reversal of the Appellate Court's clearly erroneous ruling and remand back to the Circuit Court for further proceedings.

Respectfully submitted,

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Dated: May 10, 2004

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